

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL NO. 148 of 2005****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE R.P.DHOLARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

MUTRUJA PIRUMIYA SHAIKH**Versus****STATE OF GUJARAT****Appearance:**

MR YOGESH S LAKHANI SR ADVOCATE assisted by MS RINNY KANTARIA, ADVOCATE for the Appellant(s) No. 1

MR CHIRAG H PAREKH(5249) for the Opponent(s)/Respondent(s) No. 1

MS MONALI BHATT APP (2) for the Opponent(s)/Respondent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE R.P.DHOLARIA**Date : 28/02/2019****ORAL JUDGMENT**

1. The appellant has preferred the present appeal under Section 374(2) of the Code of Criminal Procedure challenging the judgment and order of conviction dated 17.01.2005 passed in Sessions Case No. 141 of 2002 by learned Additional Sessions Judge, Patan, whereby for the offence punishable under Section 316 of the Indian Penal Code (hereinafter referred to as "IPC" for short), the appellant was sentenced to undergo rigorous imprisonment for a period of five years and ordered to pay Rs.5000/- as fine and in default of payment of fine, simple imprisonment for a period of two

years was imposed, whereas for the offence punishable under Section 323 of IPC, the appellant was sentenced to undergo rigorous imprisonment for a period of three months. Both the sentences were ordered to run concurrently.

2. Precisely, the case of the prosecution is that on 14.01.1997, during Kite Festival (*Uttarayan*), one flying kite came nearby the house of the complainant – victim – Chanchiben. At that time, the appellant – accused intercepted and pushed the victim, due to which, she fell down and thereafter, gave her 2-3 kick & fist blows. The father of the victim intervened to whom also the accused assaulted. At the relevant time, the complainant was pregnant and the incident resulted into her miscarriage. Thereby, the appellant committed an offence punishable under Sections 316 and 323 of IPC.

3. Investigation was carried out and charge-sheet came to be filed against the accused in the Court of learned Magistrate. As the case was sessions triable, the same was committed to the Court of Sessions. Thereafter, charge came to be framed and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

3.1 In order to bring home the charges against the accused, the prosecution has examined the witnesses and produced the documentary evidence.

3.2 Thereafter, after filing of closing *purshis* by the prosecution, further statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded. The accused denied the case of the prosecution and submitted that a false case is filed against him.

3.3 At the conclusion of trial and after appreciating evidence on record, the learned trial court delivered the judgment. Being aggrieved by said judgment and order of conviction dated 17.01.2005 passed in Sessions Case No. 141 of 2002 by learned Additional Sessions Judge, Patan, the appellant-accused has preferred the present appeal before this Court.

4. Learned senior advocate Mr. Yogesh Lakhani assisted by learned advocate Ms. Rinny Kantaria for the appellant has taken this Court through the entire record & proceedings and argued that the incident in question took place during Kite Festival when the people use to come out for snatching away the flying kite and on the day of incident, when flying kite came nearby the house of the complainant, suddenly, the appellant arrived there. He has argued that the complainant and the appellant were trying to snatch away the kite and at that time, the appellant pushed the complainant, due to which, she fell down and thereafter, gave 2-3 kick & fist blows. He has also argued that at a time, father of the complainant/victim intervened to whom also the appellant assaulted. Ultimately, he has argued that the entire incident occurred in order to snatch away the flying kite. According to his submission, neither the complainant nor the appellant was nourishing any intention to assault anybody, but their intention was only to snatch away the flying kite and during that course, the entire incident took place. He has also argued that due to the said incident, as the complainant was carrying pregnancy of about four months, she was aborted at the hospital, due to which, the prosecuting agency applied Section 316 of IPC which *prima facie* would not be applicable in the facts and circumstances of the case, according to his submission. He drew attention of this Court to Section 316 of IPC, placing reliance upon the decision in **Bhaskar Prasad vs. State of Madhya Pradesh [2009 CRI L J 3275]** and argued that in view of factual and legal position, no offence is being

constituted so as to punish the appellant for the offence under Section 316 of IPC. Learned senior advocate has further argued that as the matter is settled between the complainant – victim and the present appellant, the victim remained present before this Court on last occasion i.e. on 20.02.2019, placing on record the affidavit of settlement.

4.1 In view of aforesaid factual position, so far as offence alleged to have been committed under Section 323 of IPC is concerned, the parties have settled the matter outside the Court and if this Court while maintaining the conviction under Section 323 of IPC, may modify the sentence to the sentence already undergone by the appellant, the complainant has no objection.

5. On the other hand, learned Additional Public Prosecutor Ms. Monali Bhatt has supported the impugned judgment of the learned trial court and argued that no interference is called for by this Court.

6. In view of arguments advanced by learned advocates for the respective parties, a question arises for determination that as to whether in the given facts and circumstances of the case, an offence under Section 316 of IPC is being constituted against the appellant or not. In order to answer the said question, necessary documentary and oral evidence requires to be referred to.

7. Prosecution witness No. 1 – Chanchiben – complainant/victim deposed that she was married and had come for celebration of Kite Festival at her parental home. She deposed that on the day of incident, while she was standing outside the house, she noticed flying kite nearby her house, due to which, she as well as the accused who suddenly arrived there tried to snatch away the flying kite and at that time, the accused pushed her, due to which, she fell down and thereafter, he gave 2-3 kick and fist blows over her

abdomen. She further deposed that at a time, her father intervened to whom also the accused assaulted and her father also received injuries.

8. Prosecution witness No.2 – Bhikhiben – sister-in-law of the complainant/victim and prosecution witness No.3 – Manguben – sister of the complainant had not supported the case of the prosecution, though they were cited as eye-witness to the incident.

9. Prosecution witness No.4 – Dr. Suresh Raval deposed that at the relevant time, he was serving as Medical Officer with Community Hall Center at Siddhpur, Kahoda and he examined the victim on 08.07.1997. He deposed that the victim gave the history of assault by kick & fist blows. He deposed that upon her examination, there was a injury in the middle of chest. He also deposed that similarly, the injury was found over the person of the father of the victim. He deposed that they were treated as outdoor patients, though there was a miscarriage so far as the victim is concerned. The nature of injuries was described as simple.

9.1 In view of aforesaid nature of evidence and in light of the provisions of law, it would be fruitful to reproduce hereunder paragraphs 8 and 9 of the aforesaid decision in **Bhaskar Prasad (supra):-**

“8. Section 316 punishes the offence against child in womb. If a person strikes a pregnant woman and thereby causes death of her quick unborn child, he would be guilty of the offence provided the blow was intended by him to cause woman's death or was one which he knew or had reason to believe to be likely to cause it. The illustration to section reads -

A knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence

defined in this section.

9. *As explained in Jabbar vs. State AIR 1966 All 590 -*

Unless the act is done against the mother with an intention or with a knowledge, which brings it within the purview of Section 299, it cannot constitute an offence under this Section merely because the death of a quick unborn child has resulted from an act against the mother."

9.2 In light of the aforesaid clear provisions of law and on making evaluation of aforesaid evidence on record, indisputably, the complainant victim had come at her parental home for celebration of Kite Festival. While she was standing outside the house, she noticed one flying kite and on seeing kite, she and the accused who suddenly arrived there both tried to snatch away the flying kite and during that course, the accused pushed the victim, due to which, she fell down, as a result of which, there was miscarriage to her. On overall factual scenario emerging out from the evidence of the victim as well as other evidence, the resultant effect of miscarriage appears to be byproduct. It was not the imagination or intention of the appellant to kill her or to cause such injury which may likely to cause death of her quick unborn child. In that view of the matter, the learned trial court has committed an error in convicting the appellant for the offence punishable under Section 316 of IPC which is not sustainable in law and requires to be quashed and set aside.

10. So far as the offence punishable under Section 323 of IPC is concerned, the parties have settled the matter and the offence is compoundable in nature. Consequently therefore, this Court deems it appropriate to reduce the sentence to the sentence already undergone of about 27 days by the appellant, however on condition that the appellant shall deposit Rs.20,000/- towards compensation payable to the complainant victim along with fine as ordered by the learned trial court.

11. For the reasons recorded above, the appeal stands partly allowed. The judgment and order of conviction dated 17.01.2005 passed in Sessions Case No. 141 of 2002 by learned Additional Sessions Judge, Patan is quashed and set aside so far as the the offence punishable under Section 316 of IPC is concerned. Whereas, so far as offence punishable under Section 323 of IPC is concerned, while accepting the settlement arrived at between the parties, the sentence ordered under this Section by the learned trial court is reduced to already undergone by the appellant with a direction/condition that the appellant shall deposit Rs.20,000/- towards compensation payable to the complainant victim along with fine as ordered by the leaned trial court. The appellant shall deposit the said amount within a period of one month before the learned trial court and the learned trial court shall disburse the said amount of compensation to the complainant victim after due identification. Since the appellant is on bail, he need not to surrender for serving out rest of the sentence in the present case.

12. The record & proceedings be sent back to the concerned trial court forthwith.

(R.P.DHOLARIA, J)

Chandrashekhhar